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Supreme Court of the United States

OCTOBER TERM, 1929

No. 21

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. McCRORY and DUDLEY C. MONK, co-partners composing the firm of McCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of JACKSON BARNETT,

Respondents.

BRIEF FOR RESPONDENTS
In Opposition to Petition for Writ of Certiorari

CARROLL G. WALTER, New York, N. Y.
RAYBURN L. FOSTER, Tulsa, Okla.
ALMOND D. COCHRAN, Okmulgee, Okla.
Counsel for all Respondents other than The Equitable Trust Co. and Murray, Aldrich & Roberts.

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OCTOBER TERM, 1929.

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Respondents.

No. 530.

BRIEF FOR RESPONDENTS.

In Opposition to Petition for Writ of Certiorari.

Petitioner did not apply for any stay and the allowances now complained of were actually paid in September 1929, before there was any intimation that a certiorari would be sought. While that may not technically estop petitioner, we think it is a fact to be taken into consideration.

Petitioner's statement of the case is incomplete and to some extent inaccurate, but there are several preliminary objections to be noted before we set forth our correcting statement (*infra*, pp. 8-13).

I.

The petition was not filed in time.

1. Taken literally, the petition prays a review of a judgment entered September 18, 1929 (Pet. p. 2), which, upon inspection (R. 384), appears to be nothing but an order denying a petition for rehearing. Such an order is not reviewable (*Wyle* v. *Coxe*, 14 How. 1), and, moreover, petitioner is not aggrieved by it.

Construing the petition as intending to ask for a review of the judgment made by the Circuit Court of Appeals upon the merits, the petition was *filed too late*, because that judgment was entered in July, 1929 (R. 372, 377, 378) and this petition was not filed until December 18, 1929.

It is true that these respondents petitioned for a rehearing, asking that their allowance be increased (R. 378-383), but the rule that the filing of a petition for rehearing "suspends the running of the time for taking a writ of error or an appeal" (*Morse* v. *United States*, 270 U. S. 151, 153) is not applicable, we submit, inasmuch as *petitioner* did *not* seek a rehearing. Respondents' petition for rehearing could not have affected the questions which petitioner here seeks to present; and we have discovered no case which holds that the filing of a petition for rehearing by one party operates to extend the time of the *opposite* party for asking a review. The judgment entered in July, 1929, was final and reviewable when rendered,

despite the right to seek a rehearing (*Wyle* v. *Coxe*, 14 How. 1; *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 318, 319), and the filing of the petition for rehearing extended *only the time of the parties who filed it.*

This would seem especially true inasmuch as respondents' petition for rehearing was not filed within the time provided by the rules of the Circuit Court of Appeals, and the order which gave respondents additional time did not extend petitioner's time (See order at pp. 7, 8 of Appendix to Respondents' Motion for Certiorari to Correct Diminution of Record).

2. Assuming, however, that respondents' petition for rehearing extended petitioner's time for initiating proceedings for review, the present petition is still too late because, under that view, "the time within which the proceeding to review must be initiated begins from *the date of the denial*" of the petition for rehearing (*Morse* v. *United States*, 270 U. S. 151, 153, 154), and that date is not later than September 11, 1929.

The record presented by petitioner shows an order denying respondents' petition for rehearing dated September 18 and filed September 19, 1929 (R. 383, 384), but that record is incomplete upon this point and we are herewith submitting a motion, pursuant to Rule 17, to correct that diminution of record. The facts, as disclosed by that motion, are as follows: The original petition for rehearing is endorsed "Petition denied, T. W. S. A. N. H. September 7, 1929"—they being the initials of Judges SWAN and A. N. HAND. That was filed with the Clerk of the Circuit Court of Appeals on September 11, and on that date there was entered upon the docket "Petition denied". Counsel

were notified of the denial of the petition for rehearing *and the mandate was issued to the District Court on September 11.* The mandate was actually received and filed in the District Court on September 11, and on that date the Clerk of the District Court notified counsel of the receipt and filing of the mandate.

Rule 26 of the Circuit Court of Appeals provides:

> "1. A petition for re-hearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.
>
> "2. If a petition for re-hearing be filed within the time herein limited, *no mandate shall issue pending the disposition of said petition.*"

The petition for rehearing was in fact denied when two of the judges made their endorsement to that effect upon the original petition on September 7; but even if that date be disregarded, there certainly can be no doubt that it was denied when the clerk *filed that endorsement and made his docket entry of denial and issued the mandate on September 11.* The three months' limitation thus runs from that date (*Morse* v. *United States,* 270 U. S. 151, 153, 154), and as this petition for certiorari was not filed until December 18, it was out of time and must be denied upon that ground (*Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418; *Rust Land Co.* v. *Jackson,* 250 U. S. 71, 76).

While the date of the issuance of the mandate is not of itself controlling, the fact that the mandate issued on September 11 is proof that the petition for rehearing had been denied on that date (C. C. A. Rule 26, quoted at p. 4, *supra*).

The subsequent order entered by the Clerk on September 18, appearing at page 384 of the record, accomplished nothing more than already had been accomplished by the docket entry in substantially the same words on September 11. Moreover, that order is a mere nullity, because the mandate already had gone down and the court had lost jurisdiction and then had no power to grant a rehearing even if it desired to do so (*Peck* v. *Sanderson*, 18 Howard 42, and cases there cited).

If the time for filing a petition for certiorari may be kept open by entering successive orders denying a petition for rehearing, after the rehearing has been in fact denied and the mandate issued, it then can be kept open perpetually. Such a construction is inadmissible.

II.

The petition is not properly filed because not accompanied by a certified transcript and printed copies of the record.

This defect is jurisdictional.

The motions which resulted in the decree granting the allowances were made upon "all the pleadings and proceedings heretofore had herein" (R. 206, 208), and the record in the District Court is over 3500 pages, besides approximately 500 pages of printed briefs (R. 228). Only a small part of that record was actually printed for the

Circuit Court of Appeals. Printing of the depositions, testimony, exhibits and briefs (which of course were material, inasmuch as the extent and value of legal services were in issue) was dispensed with by stipulation and order (R. 359-367), which expressly provided, however, that the record on appeal should consist, not only of the matters actually printed, but, also, of "all depositions, testimony, exhibits, briefs and other papers submitted to and filed in the District Court" and that the unprinted matters should be before the Circuit Court of Appeals with the same force and effect as if printed (R. 359-367, particularly folios 1077, 1085, 1090, 1098).

No stipulation or order dispensing with printing was obtained (or asked) with respect to an application to this court for a writ of certiorari, and no resort was had to any of the usual methods of eliminating any matter believed to be immaterial (*Robertson's Supreme Court Practice*, pp. 31, 32). Nevertheless, petitioner has not here accompanied its petition with any part of the record except the comparatively small part which was actually printed in the court below.

Rule 38, subdivision 1, requires that petitions for certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed". Subdivision 7 requires that the record be printed. Subdivision 2 provides that the petition will be deemed in time "when it, *the printed record*, and the supporting brief, are filed with the clerk within the period prescribed by Section 8 of the Act of February 13, 1925".

Those provisions clearly contemplate both the filing

and the printing of a *complete* record of the proceedings in both the District Court and Circuit Court of Appeals; and obviously no court can fairly determine the right to an allowance or the extent or value of the services of attorneys in a cause without having the entire record before it.

The statute requires that applications for writs of certiorari be "*duly made* within three months after the entry" of the judgment or decree to be reviewed (Act of February 13, 1925; 43 Stat. 936; U. S. Code, Title 28, Sec. 350); and under the rules of this court such an application is not "duly made" unless the petition *and printed record* are filed with the clerk within that period. Petitioner's failure either to file or to print the entire record is thus a fatal jurisdictional defect.

Minor and inadvertent omissions from a record possibly may be overlooked upon the theory of substantial compliance; but the omission here of all the depositions, testimony, exhibits and briefs is too serious and fundamental to be excused upon that ground.

Petitioner's failure to apply for any stay of proceedings, its failure to take any steps with reference to possible reduction of matter to be printed, and its action in withholding its petition until what it apparently thought was the last day for filing, all indicate that its motive was to keep respondents in ignorance of its purpose to apply for a certiorari in order thereby to preclude respondents from filing a cross-petition asking that the allowances made by the District Court be restored. There is, therefore, no reason why petitioner should not be made to suffer the full penalty for its mistake as to timeliness and its omission to file a complete record.

III.

The question sought to be raised by petitioner does not in truth arise in this case, and petitioner is also precluded from raising it.

The circumstances of this case are unparalleled and amazing (R. 335, 173; and see reported opinions in 21 Fed. (2d) 325; 26 Id. 350; 34 Id. 916). It is not typical of other cases. Neither was it so simple as petitioner, at pp. 4, 5 of its petition, would now have this court believe (See its amended petition of intervention, R. 131-169, and p. 10 of its brief in this court in opposition to Mission Society's application for certiorari, No. 320 of October Term, 1928, 278 U. S. 626).

Jackson Barnett is an aged, full-blood, illiterate, mentally incompetent, Creek Indian, who became wealthy through the discovery of oil upon the 160 acres allotted to him when the tribal lands were allotted in severalty among the members of the tribe. In February, 1920, he was kidnapped by a white woman who carried him off to Kansas and married him (R. 173, 174, 139-143). In December, 1922, by means of a fraudulent conspiracy, he was made to put his thumb-mark upon an instrument (R. 40-43) by which he gave away $1,100,000 Liberty Bonds, representing accumulated royalties from an oil and gas lease of his allotment, which were then held for him by the Secretary of the Interior (R. 174-187; 149-166). One-half was given to the woman who kidnapped him, and the other half was given in trust for The American Baptist Home Mission Society "in an effort to make this transaction palatable" (R. 175). This gift was "approved" by the then Secretary of the Interior, ALBERT B. FALL, February 1, 1923 (R. 155).

Carl J. O'Hornett was then acting as guardian of Barnett under appointment of a court of Oklahoma where Barnett resided (R. 136). O'Hornett endeavored to get Secretary WORK to vacate the approval of the gift, or to cooperate with him in bringing suits for the recovery of the funds. Secretary WORK refused and O'Hornett resigned in June 1924 (R. 22, 23, 233-235). Elmer S. Bailey was then appointed as O'Hornett's successor, and he retained the law firm of Hummer & Foster, of Henryetta, Oklahoma, as his attorneys (R. 233-234). Hummer & Foster then themselves retained the other law firms the members of which are respondents here (R. 236).

The Secretary of the Interior refused to permit any of the funds of Barnett in his hands to be used for the purpose of prosecuting any suit for the recovery of the bonds (R. 237, 238, 287), and that refusal was persisted in even despite a recommendation by a Congressional Committee (R. 238-242).

Until this suit was instituted in January, 1925, by these respondents, no step had been taken by the United States to set aside the gifts, although nearly two years had elapsed and the matter had been repeatedly brought to the attention of both Secretary WORK and the Department of Justice.

As a result of data submitted to the Department of Justice by some of these respondents (R. 237, 238, 287, 288) Attorney-General STONE announced on February 9, 1925, in a letter to Secretary WORK, that he thought the distribution of the $1,100,000 was entirely unauthorized and it was the duty of the Government to use its best efforts to assist in recovering the same (R. 242). That letter was

written in response to a letter from Secretary WORK asking Attorney-General STONE to refuse respondents' request for co-operation and assistance (R. 242). Notwithstanding Attorney-General STONE's letter, the United States took no steps toward recovering the money until November, 1925, when it finally moved to intervene in this case (R. 319, 320; 93-109). In the interim, the United States had taken an attitude which, apparently at least, was hostile to Barnett's case (R. 243-245; 288, 289), and its intervention in this case was brought about only through the persistent efforts of these respondents (R. 254-256; 287-289; 332-337).

Equity Rule 37 expressly provides that an intervention "shall be *in subordination to, and in recognition of, the propriety of the main proceeding*". By its intervention, therefore, the present petitioner expressly conceded the right of Barnett to bring this particular suit; and that carried with it, as a necessary incident, the propriety of Bailey as next friend *and the propriety of the employment of these respondents.* When petitioner intervened, it was the entire executive department, the complete sovereignty, which intervened—the Interior Department as well as the Department of Justice (R. 109), and the Secretary of the Interior as well as the Department of Justice is thus bound by the intervention, with all its implications and consequences, including the propriety of the appearance of these respondents as next friend of and counsel for Barnett.

Furthermore, in its petition of intervention, the United States expressly prayed that the bonds be returned to the Secretary of the Interior *"after deducting the reasonable expenses incident to this litigation"* (R. 102, 320). Thus,

in the very pleading by which petitioner got into court, it expressly recognized and admitted what really was implicit in the fact of intervention, *viz.*, that the expenses of the litigation would first have to be paid out of the fund before it could be returned.

At the time petitioner applied for leave to intervene, there was pending in the District Court a motion by these respondents for an allowance out of the fund for the purpose of defraying the expenses of prosecuting the suit (R. 319, 126-128). Decision upon that motion was withheld at the request of petitioner pending its application for leave to intervene (R. 319, 320, 126), but petitioner did not oppose the granting of the motion (R. 319, 320, 127). On the contrary, it stated it did not wish to oppose (R. 319). The motion *was* opposed, however, by the defendant Mission Society *upon the precise ground now urged by the petitioner upon this application for writ of certiorari, viz.*, that the fund involved is restricted against alienation except by the approval of the Secretary of the Interior.*

Despite that opposition, the application for expense money was granted (R. 126-128) and *no appeal was taken,*

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*Petitioner's failure to bring the entire record to this court makes it impossible for us to give a supporting reference; but under the circumstances we feel justified in here quoting the following from the brief submitted by the Mission Society in opposition to that application:

> "The affidavits upon which this motion is made show that the bonds forming the trust fund here involved were so long as they were in the possession of the Secretary of the Interior, the restricted property of plaintiff who was and is a restricted Indian. If it be assumed (which is, of course, not admitted) that the action of the Secretary of the Interior in turning over plaintiff's bonds to The Equitable Trust Company was illegal, nevertheless the bonds still remained and they, together with the accrued income thereon, are the *restricted property of plaintiff and subject to the sole and exclusive control of the Secretary of the Interior;* and the bonds must be returned and the accrued income thereon must be paid to the Secretary of the Interior; *and this Court has no power to direct any other disposition of the bonds or the accrued income thereon.*"

although the order was in its nature appealable (*Trustees v. Greenough*, 105 U. S. 527).

Respondents, with petitioner's knowledge and acquiescence, relied and acted upon the order by taking voluminous depositions and in all other respects bearing the burden of the prosecution of the case; and both courts below have found as a fact that it was the respondents, not petitioner, who prosecuted the case and brought about the recovery (R. 332-334, 375). They were, moreover, expressly urged to do this and were assured by petitioner that in the event of success they would experience no difficulty in obtaining liberal compensation (R. 329).

The decree entered by the District Court after the trial directs The Equitable Trust Company "*subject to the next succeeding paragraph hereof*" to return the fund to the Secretary of the Interior to be held by him as the property of Jackson Barnett under and pursuant to the acts of Congress relating thereto (R. 197). By the "next succeeding paragraph" of that decree the District Court expressly retained jurisdiction *of the cause and of the property* for the purpose of thereafter entertaining and deciding applications by counsel for allowances out of the property for their services and disbursements, and it also stayed execution of and enjoined compliance with its direction to return the fund to the Secretary until the applications for allowances were finally determined (R. 199). That decree thus, as pointed out by the judge who made it, "clearly implied that fees and expenses in connection with the suit were expected by counsel *and would be allowed by the court*" (R. 334). Yet, petitioner not only did not itself appeal from that decree, but it joined with the

present respondents in asking that the Mission Society's appeal be dismissed and in opposing the Mission Society's application to this court for writ of certiorari (R. 325, 326; and see its brief in this court in No. 320 of October Term 1928, 278 U. S. 626).

After entry of the final decree in the District Court, petitioner expressly consented to three successive orders by which the time for making applications for allowances was extended until after the Mission Society's attempts to review the decree were terminated (R. 200-205).

Not until after all the work was done and the applications for allowances had been actually submitted was there any suggestion that any question as to the right to an allowance could or would be raised.

The order awarding expense money (R. 126-128) and the final decree on the merits (R. 196-199) constitute, we submit, conclusive adjudications of the right and power of the courts below to make allowances out of the fund, and not having been appealed from by petitioner they are binding upon it as *res judicata.*

The precise point was expressly raised and actually decided upon the application for expense money (*supra*, p. 11), and it does not detract from, but rather adds to, the force of that adjudication that petitioner did not then oppose or contest it (*Nashville, etc., R. R. Co.* v. *United States*, 113 U. S. 261; *Masters* v. *City of Rainier*, 238 Fed. 827, 832). That simply shows that petitioner then recognized, and frankly conceded, what it now undertakes to deny. Neither does it detract from the force of the adjudi-

cation that the order awarding expense money related to a different sum of money or demand (*New Orleans* v. *Citizens Bank*, 167 U. S. 371, 396, and cases there cited) and was made upon a motion without a formal joinder of issue (*Spencer* v. *Watkins*, 169 Fed. 379, 385; *Dwight* v. *St. John*, 25 N. Y. 203, 206, 207).

The effect of an adjudication as *res judicata* is not confined in its operation to subsequent independent suits or proceedings, but is equally applicable to all ancillary or collateral proceedings in the same suit (*Freeman on Judgments*, 5th Ed., Section 627-A).

Petitioner could have appealed from so much of the final decree as made the return of the fund to the Secretary subject to the allowances (R. 197, 199), and not having done so it cannot now attack that provision or be heard in opposition to it (See *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435).

It is also well settled that a party cannot assume successive positions in the course of a suit, or a series of suits in reference to the same facts, which are *inconsistent* with each other. He will be confined to the position he first adopts (*Davis* v. *Wakelee*, 156 U. S. 680, 689, 691; *Daniel* v. *Tearney*, 102 U. S. 415, 421; *Bigelow on Estoppel*, 6th Ed. p. 732). This principle, which thus prevents a party from maintaining inconsistent positions in judicial proceedings, is applicable to petitioner, for the substantial considerations underlying the doctrine of estoppel apply to sovereigns as well as to individuals, at least with respect to their position in judicial proceedings (*United States* v. *Stinson*, 125 Fed. 907, 910, affirmed 197 U. S. 200; *State* v. *Jackson, etc. Co.*, 69 Fed. 116, per Taft, Lurton & Sev-

ERENS, *JJ.*). Furthermore, petitioner is not here asserting sovereign rights. It is here merely asserting the rights of Barnett, a private citizen.

By reason, therefore, of the position taken by petitioner during the entire course of the litigation, extending from the time of its intervention down to the time the applications for allowances were submitted, it is now precluded from taking the position it now takes in this petition.

And by reason of the earlier adjudications herein, in which petitioner acquiesced, the question as to the court's power to make allowances has been conclusively adjudicated and does not in truth arise or now exist as a question to be determined.

IV.

The question raised is not presented by the record, for the additional reason that the funds here were not restricted.

Petitioner states the question to be whether the courts below had power to charge an Indian's *restricted* property with attorneys' fees (Pet. p. 2), and its entire argument proceeds upon the theory that the funds were restricted. That theory is erroneous, and for that reason the question presented is not really involved.

That the fund in question, representing accumulated royalties under a lease of restricted lands, was itself restricted property so long as it remained in the custody and control of the Secretary of the Interior is of course

conceded. That is to say, it was subject to the provision of the Act of May 27, 1908, that it could not be alienated or encumbered prior to April 26, 1931, unless the Secretary of the Interior removed that restriction (35 Stat. 312, quoted at pp. 10, 11, of petition). But the idea that the fund was still "restricted" after the Secretary himself voluntarily and deliberately relinquished his custody thereof and transferred the bonds out of his possession into the possession of the defendants, is so palpably contrary to fact, so repugnant to logic and common sense, and so wholly unsupported by authority, that the contention must be denounced as frivolous.

See opinions below on this point at R. 335 and 374, 375.

A reading of the Act of May 27, 1908 (Pet. pp. 10, 11) will show that the entire jurisdiction and power of the Secretary is limited to two things: He may remove restrictions and he may approve or disapprove leases. The gift here in question was not a lease. Therefore, the Secretary's approval of the gift and surrender of the bonds could not have been anything other than a removal of restrictions. The only reason for submitting the proposed gift to the Secretary was that by approving it and surrendering the bonds he would thereby remove the restrictions. And the gift was set aside—not because the Secretary did not remove the restrictions or did not have power to remove them, as petitioner now asserts—but because his removal of the restrictions was not sufficient to give validity to a gift which was void because of the mental incompetency of the donor. In other words, the gift was set aside, not because the Secretary did not remove the restrictions, but despite the fact that he had removed them. That

is made manifest by the opening paragraph of the District Court's opinion upon the merits (R. 173).

What the District Court decided was that the mere removal of restrictions did not convey a valid title to the donee of an incompetent donor; and it directed a return of the fund to the Secretary, not because restrictions had not been removed, but because it thought it best to *reimpose the restrictions which the Secretary had removed* (R. 195). But in its decrees it was careful to return the fund to the Secretary, and thereby reimpose the restrictions, *only after counsel had been paid* (R. 199, 201, 203, 205, 348, 349). And it should here be repeated that *petitioner expressly consented to that course* (R. 200, 203, 205).

When, therefore, petitioner asks this court to review a question as to whether the courts below had power to charge *restricted* property with allowances for attorneys' fees (Pet. p. 2), it asks it to review a question which the case does not present.

V.

The question raised has been in effect already determined by this court, and the decisions below upon this point were plainly right.

Let us now assume that restrictions were *not* removed.

Petitioner assigns, as a reason for granting the writ, that a question of Federal law of importance has been decided, which has not been, but which should be, settled by this court (Pet. p. 8). That, we submit, is erroneous—

even upon the assumption that the fund in question was and is restricted.

The case of *Kendall* v. *Ewert*, 259 U. S. 139, 149, was cited by both courts below (R. 335, 375), and is, we submit, directly in point and controlling, and actually decides the precise question petitioner here presents. In that case the suit was brought by an Indian against one to whom he had conveyed his *restricted* land, and the relief prayed for was a decree that the grantee held the land in trust for the Indian. The Indian died and the suit was revived in the name of his administrator and heirs. The heirs then settled with the grantee, and it was contended that an appeal by the administrator should be dismissed for the reason that he was not competent to prosecute it. The argument, as stated by this court, was that "the land involved continued *under restriction* until September 26, 1921, that neither it nor the royalties issuing therefrom could be incumbered until that date, and that both passed to the heirs so *freed from charges of any kind* that there was no property or estate for an administrator to administer and no function for him to perform." In rejecting that argument this court said (p. 149):

> "With this we cannot agree.
>
> "The petition in the case prayed for recovery of the land and also for an accounting for rents and profits. That Redeagle or his heirs could institute such a suit is not disputed *and to maintain it he must employ counsel and create court costs which should be paid.* The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these when accrued were clearly personal property (United States *v.* Noble, 237

U. S. 74, 80), which, on the death of Redeagle, would pass to his administrator for purposes of paying any inheritance or other taxes which might be properly chargeable against it, *and for other administration charges* and for distribution."

In *Winton* v. *Amos*, 255 U. S. 373, 393, the court stated that the principle upon which courts of equity award compensation out of a fund to counsel who have recovered or benefited the fund is *analogous to the salvage services of the maritime law*. The numerous cases in which this court has sustained and enforced claims for salvage services against property owned by a sovereign thus also sustain the right of the courts below to make the allowances in this case, even though the fund in question were in truth restricted; for the restriction against alienation without the Secretary's approval is no stronger and no more sacrosanct than a sovereign's immunity.

Special attention is called to *The Davis*, 10 Wall. 15, in which property of the United States was subjected to a claim for salvage services despite the sovereign's immunity from suit and despite the fact that the claim could not have been enforced by suit *in rem* against the property if it had been necessary, in order to enforce the claim, to take the property out of the possession of the government by any writ or process of the court. This court stated that when the property of the government has been saved from destruction by salvors, "justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition" (p. 19); and the court held that as the property was not in the possession of the govern-

ment (having been seized by the marshal under the libel while in the possession of the vessel which had contracted to carry it for the United States) the court could and should "enforce the lien of the libelants for the salvage *before it restored the cotton to the custody of the officers of the government*" (p. 22). The court also pointed out that by possession it meant *actual* possession, and not merely constructive possession implied from ownership, and that as the court could enforce the claim for services without "bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist" (p. 22), the court had jurisdiction to enforce the claim.

Other cases to the same effect are:

United States v. *The Thekla*, 266 U. S. 328;
The Siren, 7 Wall. 152;
In re United States Steel Products Co., 24 Fed. 2d, 657 (C. C. A., 2d Circuit).

Those cases, we submit, authoritatively establish that, even if it be assumed that the fund here in question was restricted and could not have been subjected to claims for attorneys' services if the fund were in the actual possession of the Secretary of the Interior, yet, inasmuch as it was *not* in the actual possession of the Secretary, the claim for services may be enforced by the courts, and that it was the duty of the courts to enforce it before restoring the fund to the Secretary.

As stated by both courts below, the fund passed out of the possession of the Secretary and court action was necessary to get it back (R. 335, 374). Petitioner, by its intervention in respondents' suit, joined with respondents in

endeavoring to get it back; and as was said by this court in *United States* v. *The Thekla, supra*:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized."

The restriction against alienation without the Secretary's approval was imposed by Congress in order to protect the Indians from despoilers, and not to enable them to avoid just claims for services in recovering their property where the Secretary himself has turned despoiler.

Petitioner's present contention that the Secretary alone could authorize payment of a fee (Pet. pp. 14, 15) amounts to saying that the wrongdoer should determine his opponent's fee for undoing his wrongful act. If that be the law, similar acts may be done in the future with impunity.

As the property of the United States itself may be subjected to claims for services in salvaging it, there is no reason why the property of Indians may not be subjected to similar claims even though the Indian himself may have no right to convey or encumber it.

The courts below were clearly right in following the reasoning and adjudication of the cases above cited, and the case presents no new or unsettled question justifying a certiorari.

Attention is also called to *New York Dock Co.* v. *S. S.*

Poenan, 274 U. S. 117, in which a claim for wharfage of a vessel *in custodia legis* was allowed as a preferred claim upon the proceeds of the vessel. The court there stated that such a claim should be allowed as an "expense of justice" without regard to any equitable or maritime lien in a technical sense. The principle of that case, as well as much of the language in the opinion (pp. 121, 122), is applicable here, and it, also, in effect decides the question which petitioner puts forward as a basis for a certiorari.

VI.

The allowances were not excessive, and, in any event, petitioner's claim to the contrary affords no ground for a certiorari.

If there had been any good reason for supposing that this court would grant a certiorari to review the amount of the allowances, we certainly would have applied for a certiorari ourselves.

The District Court allowed counsel 25% of the fund plus $10,000 (R. 336), which amounted to $184,881.08 (R. 348, 349), and allowed the *prochein ami* $7,500.00 (R. 336). In fixing that amount it proceeded upon *its own judgment as to what was fair and reasonable* (R. 336). It did not follow or adopt either of the contracts to which petitioner devotes so much space (Pet. pp. 6, 7), although it would have been fully justified in so doing despite the fact that the contracts concededly were not binding upon it (*Winton*

v. *Amos*, 255 U. S. 373, 393; *McGowan* v. *Parish*, 237 U. S. 285, 299, 300).*

The Circuit Court of Appeals reduced the allowance to counsel to $100,000 (R. 377), which is but slightly over 15% of the recovery, even according to that court's method of computing the amount involved (R. 383), and considerably less than $125.00 per day for the time actually spent (R. 382). The $100,000 so allowed covered the services of four different law firms who had been engaged upon the litigation for substantially *five years*, and figured upon a yearly basis is thus the equivalent of only $5,000 per year for each firm (R. 382). Nor is that amount net to the lawyers, for their expenses for office work, clerk hire and stenographers' services had to be paid.

Both courts below certainly are in agreement that the amounts as finally allowed are not excessive; and in *United States* v. *Carter*, 217 U. S. 286, 319, 320, this court said with respect to an allowance to counsel out of a fund:

> "So far as the amount of the allowance is concerned, we do not feel authorized to disturb it, as two

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*With reference to the contract of Cochran & Ellison with certain heirs of Barnett referred to at p. 6 of the petition, we desire to state that the services in question were not rendered under it and it never was relied upon by respondents for any purpose whatever. It was put in evidence upon the trial *by defendant Mission Society* upon a point which had nothing to do with any question of allowances, as petitioner well knows. All services in this litigation were rendered under the retainer of the next friend.

With reference to the contract of Hummer & Foster with Bailey *as guardian*, we desire the court to note that it was approved by the Oklahoma County Court which appointed the Guardian (R. 235, 266) and was authorized by the law of that State (*Okl. Comp. Stat.* 1921, sec. 4101; *Berryhill* v. *Spillers*, 232 Pac. 376, 377; *Cotner* v. *Lon Jacobs Grocery Co.*, 202 Pac. 997, 1000; *Evans* v. *Harris*, 158 Pac. 898; *In re Myers' Estate*, 219 Pac. 943) and also by the law of New York (*Judiciary Law*, Sec. 474; *Matter of Fitzsimons*, 174 N. Y. 15; *Morehouse* v. *Brooklyn Heights R. R. Co.*, 123 App. Div. 680, affirmed 195 N. Y. 537; *Matter of Meng*, 227 N. Y. 264). While not technically binding upon the courts below (as we freely conceded), it could have been, and we submit should have been, adopted by them as a measure of the compensation to which counsel were entitled (*Winton* v. *Amos*, 255 U. S. 373, 393; *McGowan* v. *Parish*, 237 U. S. 295, 299, 300).

courts in succession have concurred in the amount allowed as reasonable."

It may be added, too, that the allowance as fixed by the Circuit Court of Appeals is much less, proportionately, than this court allowed to a Special Master in *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101. In that case this court allowed a total of $49,250 for 282 days' work, which is at the rate of $175.00 per day for the services of a judicial officer in a matter which involved no element of risk or contingency, whereas here the compensation of respondents necessarily had to be entirely contingent upon success because otherwise there was no source from which payment could be obtained (R. 211, 235, 236, 283, 284).

In *Hodgman* v. *Atlantic Refining Co.*, 8 Fed. (2d) 777, the District Court in Delaware allowed *one-third* of the recovery up to $500,000 and 10% of the excess up to $1,000,000 and 5% of the excess above $1,000,000.

In *Grant* v. *Fletcher*, 283 Fed. 243, 274, the District Court in Michigan awarded 50% of the recovery.

In *Frinck* v. *McComb*, 60 Fed. 486, decided as long ago as 1894, an allowance of one-third of the recovery, with interest, in addition to expenses, was made by Judges Dallas and Wales.

In view of the foregoing, we feel we should refrain from burdening the court with even a summary statement of the extent and nature of the services rendered. The fact that the complete record is not here prevents the court from having a complete view of them, but the attention of the court is directed to the affidavits of services at R.

210-292 and 318-330 and also to the opinion of the District Court at R. 331-337.

In *United States* v. *Johnston*, 268 U. S. 220, 227, it was said that this court does not "grant a certiorari to review evidence and discuss specific facts."

In *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, the certiorari was dismissed because the argument developed that a question of fact only was involved.

VII.

The petition should be denied in the interest of substantial justice.

We agree with the statement at page 16 of petitioners' brief that the duty devolved upon the United States to protect the Indian. Had that duty been performed, the fund never would have passed out of the Secretary's custody, and there would have been no law suit and no attorneys' fees to be paid. The entire situation is thus due to petitioner's violation of its duty.

With reference to petitioner's statement that, the wrong having been done, the United States *should* have assumed the whole burden of recovering the property (id. p. 16), we call attention to the fact that this court has expressly stated that "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the Acts of Congress to the discretion of the executive department" and that the

Indian "may be permitted to bring his own action, or if so brought the United States may aid him in its conduct" (*Heckman* v. *United States*, 224 U. S. 413, 446).

Here, the United States did not undertake to represent the Indian at all (despite these respondents' pleas that it do so) until after the Indian had brought his own action through these respondents, and the method of representation which it elected was an intervention in the Indian's suit. Even after that intervention it consciously and deliberately left to the respondents "the heat and burden of the conflicts which established Barnett's right to claim his own", as both courts below have expressly found (R. 332, 375). As stated by the Circuit Court of Appeals, the respondents "did substantially all that was done" (R. 375).

For the United States now to say that respondents should not be paid—or, rather, should be forced to return what they already have been paid—shocks one's sense of decency and fairness, and is contrary to the "most elementary notion of justice" (*N. Y. Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, 121).

For it to say that the interests of the United States and of the next friend and his attorneys "were in material aspects adverse from the beginning" because respondents were suing to "recover the property for *Bailey*" and that the respondents "had a double interest in the suit" (Pet. pp. 16, 17), is a patent and inexcusable mis-statement of fact. The plaintiff in the case was *Barnett, not Bailey*, and the prayer of the bill was that the bonds and their proceeds be returned to the plaintiff (R. 25). Of course, respondents expected to be paid for their services, as all

attorneys do, but they neither had nor represented any interest in the case except the interest of Barnett—and it was Barnett who won as a result of respondents' efforts.

The petition should be denied.

Respectfully submitted,

CARROLL G. WALTER,
New York, N. Y.

RAYBURN L. FOSTER,
Tulsa, Okla.

ALMOND D. COCHRAN,
Okmulgee, Okla.

Counsel for all Respondents other than The Equitable Trust Co. and Murray, Aldrich & Roberts.

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